

RESOLUTION NO. 23952

A RESOLUTION AUTHORIZING THE FIRE CHIEF OF THE CITY OF CHATTANOOGA TO ENTER INTO A MEMORANDUM OF AGREEMENT WITH THE INDUSTRIAL DEVELOPMENT BOARD OF HAMILTON COUNTY AND KOMATSU CORPORATION, RELATIVE TO INSTALLATION OF A DRIVEWAY FOR FIRE STATION NO. 17, ON REAL PROPERTY LOCATED ON MUNDY STREET, MORE PARTICULARLY DESCRIBED HEREIN, WITH THE CITY'S PORTION OF SAID PROJECT NOT TO EXCEED EIGHTY-FIVE THOUSAND DOLLARS (\$85,000.00).

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF CHATTANOOGA, TENNESSEE, That the Fire Chief of the City of Chattanooga be and is hereby authorized to enter into a Memorandum of Agreement with the Industrial Development Board of Hamilton County and Komatsu Corporation, relative to installation of a driveway for Fire Station No. 17, on real property located on Mundy Street, Tax Map No. 1170-A-008, with the City's portion of said project not to exceed \$85,000.00. Said property being more particularly described as follows:

SITUATED in the Signal Hills area, as shown by deed of record in Book 3134, page 601, in the office of the Register of Hamilton County, Tennessee. Said easement being more particularly described as follows, to wit:

BEGINNING at point in the southern right-of-way line of Mundy Street, said point being the northwestern corner of property number 1170-A-008, on the Hunnicutt tax map; thence along said southern right-of-way line South 85 degrees 20 minutes 11 seconds East a distance of one hundred nineteen and forty-six hundredths feet (119.46'), more or less, to a point; thence South 0 degrees 11 minutes 33 seconds East a distance of ninety-two and forty-five hundredths feet (92.45'), more or less, to a point; thence South 87

degrees 10 minutes 3 seconds West a distance of fifty-eight and forty-seven hundredths feet (58.47'), more or less, to a point in the western line of said property; thence North 30 degrees 7 minutes 53 seconds West a distance of one hundred twenty-one and forty-seven hundredths feet (121.47), more or less, to the POINT OF BEGINNING for a total of 8,658 square feet, more or less.

ADOPTED: November 4, 2003

PAN/pm

MEMORANDUM OF AGREEMENT BETWEEN
THE CITY OF CHATTANOOGA,
THE INDUSTRIAL DEVELOPMENT BOARD OF HAMILTON COUNTY
AND KOMATSU AMERICA INTERNATIONAL COMPANY

This memorandum of agreement (this "MOA") is entered into as of the ____ day of _____, 2003, by and between the City of Chattanooga, (the "City"), a municipal corporation of the State of Tennessee, the Industrial Development Board of Hamilton County, and Komatsu America International Company (hereinafter "Komatsu"), a Tennessee for profit corporation.

W I T N E S S E T H :

WHEREAS, the parties to this agreement all desire to work together on granting the City access to Mundy Street and paving a driveway access from the rear of CFD Station #17 onto Mundy Street as shown on the attached map across property which is owned by the Industrial Development Board of Hamilton County, and/or Komatsu; and

WHEREAS, all parties to this agreement have requested that a permanent easement be granted to the City of Chattanooga across property owned by the Industrial Development Board of Hamilton County which has been approved by resolution of the Chattanooga-Hamilton County Planning Commission after mandatory referral; and

WHEREAS, Komatsu has agreed to build and pave the driveway access onto Mundy Street and provided the City with access from that driveway provided that the City agrees to equally share in the construction of the driveway which will not exceed \$85,000.00 to the City of Chattanooga;

NOW, THEREFORE, for the mutual promises and other good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, the parties hereto agree as follows:

1. **Agreement Documents.** This MOA is comprised of the following documents:

(a) This MOA; and

(b) Any written amendment duly authorized and executed by the authorized representatives of the parties hereto and filed in the office of the Chattanooga City Council Clerk.

2. **Duties and Responsibilities of Industrial Development Board of Hamilton County.** The Industrial Development Board of Hamilton County agrees to provide a written permanent easement to the City of Chattanooga in the form attached to this MOA conveying to the City the right to use a portion of its property and allowing the construction and maintenance of a driveway across it as shown on the attached Drawing No. 601835. It is understood that as a result of this permanent easement on a vacant portion of the property as described in the attached permanent easement the City shall obtain certain rights to use this driveway for its fire trucks and other vehicles entering and leaving Station # 17. This permanent easement shall entitle the City to perpetual access from Station # 17 onto Mundy Street and all parties to this Agreement are prohibited from leaving any vehicles in this right-of-way which would deter access onto Mundy Street for emergency vehicles.

3. **Duties and Responsibilities of Komatsu.** Komatsu agrees to construct a driveway onto Mundy Street in the areas shown on the attached map which shall connect the rear parking area of CFD Station #17 into a driveway to be constructed by Komatsu from the rear of its parking lot onto Mundy Street in the general direction of the K Mart entrance onto Mundy

Street. Komatsu agrees to construct this driveway and all connections from the CFD Station # 17 parking lot in a safe and reasonable manner and to standards suitable for the weight bearing requirements of heavy vehicles such as fire trucks utilized by the City of Chattanooga. Komatsu agrees to comply with any signage or signalization requirements of the City Traffic Engineer in the building of this driveway to provide safe entrances and exits of all vehicles onto Mundy Street and/or any construction specifications required by the City Engineer for this project. Komatsu agrees that it will not leave any vehicles or obstructions to travel on the City right-of-way onto Mundy Street which would deter access for emergency vehicles.

4. **Duties and Responsibilities of the City.** The City agrees to provide payment to Komatsu and/or the Industrial Development Board of Hamilton County as payment for a permanent easement allowing the Chattanooga Fire Department to enter and exit from Station #17 onto Mundy Street and to share in the cost of driveway construction incurred by Komatsu for one half of the total cost of this project in an amount not to exceed \$85,000.00. The City Engineer shall approve all construction plans and specifications prior to construction of the driveway to ensure it will meet construction standards required by the City for this project. After completion of this project, all costs of driveway construction shall be audited by the City Finance Officer to determine that the City of Chattanooga's cost for this project does not exceed fifty percent (50%) of the construction costs and that the costs of construction in a total amount not to exceed \$85,000.00 are not excessive for the benefits received by the City under this Agreement.

5. **Remedies for Default - - Termination.**

(a) **Remedies for Default.** Should Komatsu fail to fulfill in a timely and proper manner its obligations under this MOA or if it should violate any of the terms of this MOA, the City shall have the right to immediately terminate this MOA. Such termination shall not relieve Komatsu of any liability to the City for damages

sustained by virtue of any breach by Komatsu. The City may, in its sole and absolute discretion, cure any Komatsu default without terminating this MOA, whereby Komatsu agrees to reimburse the City within ten (10) days of receiving written notice from the City, as provided hereunder, for all costs borne by the City to cure such default.

- (b) **Termination - - Funding.** Should Komatsu fail to begin construction of this driveway on or before January 1, 2004, the City shall have the right to discontinue funding for this MOA and terminate this MOA immediately upon written notice to Komatsu.
- (c) **Termination - - Notice.** The City may terminate this MOA for convenience ("Termination for Convenience") on thirty (30) days written notice to Komatsu. Should the City terminate for default and it is later determined that Komatsu was not in default, then such termination shall be deemed to be a Termination of Convenience.
- (d) **Effective Date of Termination.** This MOA shall terminate effective upon Komatsu's actual receipt of written notice from the City if the same is hand-delivered or if sent via first class U.S. Mail or via a nationally recognized commercial delivery service, the date when notice was actually sent.

6. **Compliance with laws.** Komatsu agrees to comply with all applicable federal, state, and local laws and regulations in the design and construction of this driveway project onto Mundy Street. All construction plans shall be approved by the City Engineer and the City Traffic Engineer before construction shall begin on this project.

7. **Notices.**

Notices to the City shall be sent to:

Fire Chief Jim Coppinger
c/o City Attorney
801 Broad Street, Suite 400
Chattanooga, TN 37402

Notices to Industrial Board of Hamilton County shall be sent to:

Industrial Development Board of Hamilton County
c/o Ross I. Schram, III
801 Broad Street, Sixth Floor

Chattanooga, TN 37402

Notices to Komatsu shall be sent to:

Komatsu America International Company
c/o Dennis Riddell, Plant Manager
409 Signal Mountain Road
Chattanooga, Tennessee 37405

8. **Modification of MOA.** This MOA may be modified only by written amendment executed by all parties and their signatures thereto.

9. **Partnership/Joint Venture.** Nothing herein shall in any way be construed or intended to create a partnership or joint venture between the parties or to create the relationship of principal and agent between or among any of the parties. None of the parties hereto shall hold itself out in a manner contrary to the terms of this paragraph. No party shall become liable for any representation, act or omission of any other party under the provisions of this MOA; it is specifically agreed and understood that the City has no financial interest in the business of Komatsu, and shall not be liable for any debts or obligations incurred by Komatsu. The status of the parties is not that of agent and servant, but rather, an independent contractor relationship. Komatsu shall not, at any time or times, use the name or credit of the City in entering into contracts, applying for credit or purchasing or attempting to purchase any equipment, supplies or property of any type whatsoever.

10. **Waiver.** No waiver of any provision of this MOA shall affect the right of any party thereafter to enforce such provision or to exercise any right or remedy available to it in the event of the other party's default.

11. **Employment.** Komatsu shall not subscribe to any personnel policy that permits or allows for the promotion, demotion, employment, dismissal or laying off of any individual

due to race, creed, color, national origin, age, sex, or that is in violation of applicable laws concerning the employment of individuals with disabilities.

12. **Fidelity Bond.** Komatsu shall provide a fidelity bond to insure the good and faithful handling of money for the protection of the City in the amount of One Hundred Thousand Dollars (\$100,000.00) by a company licensed to do business in the State of Tennessee with a financial rating of at least A/VIII as rated in the most recent addition of Best's Insurance Reports, and approved by the City. The fidelity bond so provided shall cover all employees of Komatsu who handle any funds received from the City relating to this driveway project.

13. **Contingent Fees.** Komatsu hereby represents that it has not been retained or retained any persons to solicit or secure a City contract or agreement upon an agreement or understanding for a contingent commission, percentage, or brokerage fee, except for retention of bona fide established commercial selling agencies for the purpose of securing business. Breach of the provisions of this paragraph is, in addition to a breach of this MOA, a breach of ethical standards that may result in civil or criminal sanctions and/or debarment or suspension from being a contractor or subcontractor under City contracts.

14. **Gratuities and Kickbacks.** It shall be a breach of ethical standards for any person to offer, give or agree to give any employee or former employee, or for any employee or former employee to solicit, demand, accept or agree to accept from another person, a gratuity or an offer of employment in connection with any decision, approval, disapproval, recommendation, preparation or any part of a program requirement or a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing, or in any other advisory capacity in any proceeding or application,

request for ruling, determination, claim or controversy or other particular matter, pertaining to any program requirement of a contract or subcontract or to any solicitation or proposal therefore. It shall be a breach of ethical standards for any payment, gratuity, or offer of employment to be made by or on behalf of a subcontractor under a contract or to the prime contractor or higher tier subcontractor or a person associated therewith, as an inducement for the award of a subcontract or order. Breach of the provisions of this paragraph is, in addition to a breach of this MOA, a breach of ethical standards that may result in civil or criminal sanctions and/or debarment or suspension from being a contractor or subcontractor under City contracts.

15. **Indemnification and Hold Harmless.** Komatsu shall indemnify and hold harmless City, its officers, agents, and employees from:

- (a) Any claims, damages, costs and attorney fees for injuries or damages arising, in part or in whole, from the negligent or intentional acts or omissions of Komatsu, its officers, employees and/or agents, including its sub or independent contractors, in connection with the performance of this MOA; and,
- (b) Any claims, damages, penalties, costs and attorney fees arising from any failure of Komatsu, its officers, employees and/or agents, including its sub or independent contractors, to observe applicable law, including, but not limited to, labor laws and minimum wage laws.
- (c) The City will not indemnify, defend or hold harmless in any fashion Komatsu from any claims, whether arising from this MOA or any understanding between the parties, regardless of any language in any attachment or other document that Komatsu may provide. The City shall be responsible only for the acts/omissions of its officers, employees and/or agents.
- (d) The City shall pay Komatsu its expenses incurred as a result of the City's failure to fulfill its obligations in a professional and timely manner under this MOA.

16. **Assignment – Consent Required.** The provisions of this MOA shall inure to the benefit of and shall be binding upon the respective successors and assignees of the parties hereto. Neither this MOA nor any of the rights and obligations of Komatsu hereunder shall be assigned

or transferred in whole or in part without the prior written consent of the City. Any such assignment or transfer shall not release Komatsu from its obligation hereunder.

17. **Entire MOA.** This MOA sets forth the entire agreement between the parties with respect to the subject matter hereof and shall govern the respective duties and obligations of the parties. The parties hereto warrant and represent that there are no prior or contemporaneous oral or written understandings that contradict, modify or supplement this MOA, it being the intent of the parties hereto that the Agreement Documents comprise the entire intent of the parties hereto.

18. **Force Majeure.** No party shall have any liability to the other hereunder by reason of any delay or failure to perform any obligation or covenant if the delay or failure to perform is occasioned by force majeure, meaning any act of God, storm, fire, casualty, unanticipated work stoppage, strike, lockout, labor dispute, civil disturbance, riot, war, national emergency, act of government, act of public enemy, or other cause of similar or dissimilar nature beyond its control.

19. **Governing Law.** The validity, construction and effect of this MOA any and any all extensions and/or modifications thereof shall be governed by the laws of the State of Tennessee. Tennessee law shall govern regardless of any language in any attachment or other document that Komatsu may provide.

20. **Venue.** Any action between the parties arising in connection with this MOA shall be maintained in the courts of Hamilton County, Tennessee.

21. **Severability.** Should any provision of this MOA be declared to be invalid by any court of competent jurisdiction, such provision shall be severed and shall not affect the validity of the remaining provisions of this MOA.

22. **Effective Date.** This MOA shall not be binding upon the parties until it has been signed first by Komatsu and then by the authorized City representatives and filed in the office of the Chattanooga City Council Clerk. When it has been so signed and filed, this MOA shall be effective as of the Effective Date.

IN WITNESS WHEREOF, the City of Chattanooga, the Industrial Development Board of Hamilton County, and the Komatsu America International Company have executed their signatures to this document by their authorized agents as of the date first above-written.

CITY OF CHATTANOOGA, TENNESSEE

BY: _____
FIRE CHIEF

KOMATSU AMERICA INTERNATIONAL COMPANY

BY: _____
PLANT MANAGER

INDUSTRIAL DEVELOPMENT BOARD

BY: _____